Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-520

CLETE KING,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals rendered on the 19th day of April, 1977 which affirmed the trial court's denial of the Petition for Writ of Error Coram Nobis, the basis for the Petition for Writ of Certiorari to the Supreme Court of the United States, has not yet been reported.

The judgment which denied certiorari to the Alabama Supreme Court has also not yet been reported. A copy of

the aforementioned opinion and judgment and all related opinions and judgments appear in Appendix "A" of the instant petition.

JURISDICTION

The Petitioner's conviction was affirmed by the Alabama Court of Criminal Appeals on the 22nd of April, 1975. Application for rehearing in the Court of Criminal Appeals of Alabama was denied without opinion on the 27th day of May, 1975. The petition for writ of certiorari filed in the Supreme Court of Alabama was denied on June 12, 1975.

A Petition for Writ of Error Coram Nobis filed with the trial court was denied on October 24, 1975. Appeal was taken to the Alabama Court of Criminal Appeals and the trial court's judgment was affirmed without opinion on May 4, 1976. Application for rehearing filed in the Alabama Court of Criminal Appeals was denied without opinion on June 1, 1976. Petition for writ of certiorari was filed and the Alabama Supreme Court remanded the cause to the Court of Criminal Appeals by its opinion dated December 30, 1976. The Alabama Court of Criminal Appeals affirmed the trial court's denial of the Petition for Writ of Error Coram Nobis in its Opinion entered April 19, 1977. Application for rehearing filed with the Alabama Court of Criminal Appeals was denied without opinion on May 24, 1977. A petition for writ of certiorari filed with the Alabama Supreme Court was denied without opinion on July 8, 1977.

QUESTIONS PRESENTED

I.

Whether Rule 60(b) of the Alabama Rules of Civil Pro-

cedure has abolished writs of error coram nobis in criminal cases and substituted therefor a different procedure which may be employed to obtain relief from a judgment?

II.

Whether or not the Petitioner was afforded an adequate post-conviction remedy and thus whether or not the Petitioner was denied due process under the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Cullman County, Alabama on the charge of selling, removing or concealing property covered by a lien.

The Petitioner subsequently filed a Petition for Writ of Error Coram Nobis with the trial court. That petition was denied and subsequent thereto the Alabama Court of Criminal Appeals affirmed the trial court's denial of the Writ of Error Coram Nobis. It is that denial that is the basis of the instant Petition for Writ of Certiorari.

The following is taken from the opinion in issue of the Alabama Court of Criminal Appeals and is presented as the appropriate Statement of the Case:

"At the coram nobis hearing Mr. Robert L. Petrey, the loan officer at the First National Bank of Montgom-

ery who handled the loan transaction with Mr. King, testified that 'Based upon the information that I have from the First National Bank I was mistaken when I testified that I issued a check to Mr. King in the afternoon. The records indicate that the check was issued in the morning, the date the loan was made. And as far as the serial number on the automobile is concerned I cannot testify whether it was given to me by Clete King or by Willie Smith, who was an officer with the bank at that time.'

"Mr. Petrey further stated that he testified to what he believed to be the truth at the time of Mr. King's original trial."

SUMMARY OF ARGUMENT

Rule 60(b) of the Alabama Rules of Civil Procedure has not abolished writs of error coram nobis in criminal cases and has not substituted therefor a different procedure which may be employed to obtain relief from a judgment.

The Petitioner was afforded an adequate post-conviction remedy by the Petition for Writ of Error Coram Nobis and therefore was not denied due process under the Constitution of the United States.

ARGUMENT

Contrary to the Petitioner's contention, Rule 60(b) of the Alabama Rules of Civil Procedure has not abolished writs of error coram nobis in Alabama criminal cases and has not substituted therefor a different procedure which may be employed to obtain relief from a judgment. The Alabama Rules of Civil Procedure have no application in criminal

proceedings. See the Committee's Comments following Rule 1 of the Alabama Rules of Civil Procedure and *Burns v. State*, 57 Ala. App 281, 327 So 2d 920 (1975). The common law writ of error coram nobis is still a part of the Alabama criminal system of justice and is constantly resorted to in proper cases.

Therefore, and again contrary to the Petitioner's contention, the Petitioner was afforded an adequate post-conviction remedy by the Petition for Writ of Error Coram Nobis. However, the Petition for Writ of Error Coram Nobis was denied because of the Petitioner's own failure to properly pursue the remedies made available to him. In affirming the denial of the Writ of Error Coram Nobis, the Alabama Court of Criminal Appeals pointed out, as did the trial court, that the Petitioner had ample opportunity to have the bank records in question available at his original trial and was negligent in not doing so. The Alabama Court of Criminal Appeals correctly pointed out that there was no allegation in the Petition for Writ of Error Coram Nobis and, of course, no proof that the State knowingly used perjured testimony to convict the Petitioner on the original trial.

In *Ex parte Brannan*, 41 Ala. App. 500, 139 So 2d 349 (1962) and *Horsly v. State*, 42 Ala. App. 567, 172 So. 2d 56 (1965), the Alabama Court of Criminal Appeals held that to obtain coram nobis relief from a conviction on the ground of perjured testimony the testimony must be shown to have been knowingly used by the prosecution and the convict must not have been negligent. The mere fact that a witness gave contradictory testimony does not establish that a defendant was convicted on false or perjured testimony. *Echols v. State*, 276 Ala. 489, 164 So. 2d 486 (1964).

The petitioner, at most, has established that Mr. Petrey, the witness in question, gave contradictory testimony; but, the Petitioner failed to establish that the State knowingly used perjured or even false estimony.

Therefore, it is obvious that the Petitioner was afforded an adequate post-conviction remedy by the Petition for Writ of Error Coram Nobis but that, due to the Petitioner's own failure to act diligently at his original trial and due to his failure to sustain the burden of proof required of him at the coram nobis proceeding, the Petition for Writ of Error Coram Nobis was properly denied. Thus, the Petitioner was not denied due process of law under the Constitution of the United States.

In reality, the only matters raised involve State procedure and thus the Petitioner presents no federal question for review. *Lisenba v. California*, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed 166 (1931). Therefore, the petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that the opinion of the Alabama Court of Criminal Appeals which affirmed the denial of the Writ of Error Coram Nobis was correct and that the due process clause of the Fourteenth Amendment to the Constitution of the United States was not violated. Therefore, the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, David W. Clark, one of the attorneys for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of November, 1977, I served three copies of the foregoing brief and argument on the attorney for Petitioner, by mailing said copies in a duly addressed envelope to said attorney of record, as follows: Honorable Benjamin E. Pool
P.O. Box 2247
Montgomery, Alabama 36103

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